

Todd M. Friedman (SBN 216752)  
 tfriedman@toddfllaw.com  
 Adrian R. Bacon (SBN 280332)  
 abacon@toddfllaw.com  
 Law Offices of Todd M. Friedman, P.C.  
 21550 Oxnard St., Suite 780  
 Woodland Hills, CA 91367-7104  
 Telephone: 877-206-4741  
 Facsimile: 866-633-0228  
*Counsel for Plaintiff*

Manuel S. Hiraldo  
*Pro Hac Vice Forthcoming*  
 401 E. Las Olas Boulevard  
 Suite 1400  
 Ft. Lauderdale, Florida 33301  
 mhiraldo@hirdolaw.com  
 Telephone: 954.400.4713  
*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

|                                   |   |                                     |
|-----------------------------------|---|-------------------------------------|
|                                   | ) | Case No.                            |
| ALLISON FERJEAN, individually and | ) |                                     |
| on behalf of all others similarly | ) | <b><u>CLASS ACTION</u></b>          |
| situated,                         | ) |                                     |
|                                   | ) | <b>COMPLAINT FOR DAMAGES</b>        |
| Plaintiff,                        | ) | <b>AND INJUNCTIVE RELIEF</b>        |
|                                   | ) | <b>PURSUANT TO THE</b>              |
|                                   | ) | <b>TELEPHONE CONSUMER</b>           |
| vs.                               | ) | <b>PROTECTION ACT, 47 U.S.C. §</b>  |
|                                   | ) | <b>227, ET SEQ.</b>                 |
|                                   | ) |                                     |
| FIVE STARS LOYALTY, INC., and     | ) | <b><u>DEMAND FOR JURY TRIAL</u></b> |
| DOES 1 through 10, inclusive, and | ) |                                     |
| each of them,                     | ) |                                     |
|                                   | ) |                                     |
| Defendant.                        | ) |                                     |
|                                   | ) |                                     |

///



1 Defendant's illegal conduct which has resulted in the invasion of privacy, harassment,  
2 aggravation, and disruption of the daily life of thousands of individuals nationwide.  
3 Plaintiff also seeks statutory damages on behalf of himself and members of the class,  
4 and any other available legal or equitable remedies resulting from the illegal actions of  
5 Defendant.  
6

### 7 **JURISDICTION AND VENUE**

8  
9  
10 7. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff, a  
11 resident of Texas, seeks relief on behalf of a Class, which will result in at least one class  
12 member belonging to a different state than that of Defendants, a Delaware limited  
13 liability company with its principal place of business in California. Plaintiff also seeks  
14 \$1,500.00 in damages for each call in violation of the TCPA, which, when aggregated  
15 among a proposed class in the thousands, exceeds the \$5,000,000.00 threshold for  
16 federal court jurisdiction. Therefore, both diversity jurisdiction and the damages  
17 threshold under the Class Action Fairness Act of 2005 ("CAFA") are present, and this  
18 Court has jurisdiction. This Court has federal question subject matter jurisdiction  
19 pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.  
20

21  
22  
23 8. Venue is proper in the United States District Court for the Northern District  
24 of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendants are  
25 subject to personal jurisdiction in the County of San Francisco, State of California  
26

27  
28 9. The Court has personal jurisdiction over Defendant because it conducts

business in this state, and its principle place of business is in this District.

### **PARTIES**

10. Plaintiff is a natural person who, at all times relevant to this action, was a resident of the State of Texas. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).

11. Defendant is a Delaware limited liability company whose principal office is located at 340 Bryant St #300, San Francisco, CA 94107. Defendant directs, markets, and provides its business activities throughout the United States.

12. The above named Defendant, and its subsidiaries and agents, are collectively referred to as “Defendants.” The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

13. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known

1 to, and ratified by, each of the other Defendants.

2  
3 **THE TELEPHONE CONSUMER PROTECTION ACT**

4 14. The TCPA regulates and restricts the use of automatic telephone  
5 equipment. Furthermore, the TCPA protects consumers from unwanted calls, text  
6 messages, and facsimile transmissions that are made utilizing an automatic telephone  
7 dialing system and/or prerecorded messages.  
8

9  
10 15. The TCPA prohibits: (1) any person from calling a cellular telephone  
11 number; (2) using an automatic telephone dialing system or prerecorded message; (3)  
12 without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).  
13

14 16. The TCPA defines an "automatic telephone dialing system" ("ATDS") as  
15 "equipment that has the capacity - (A) to store or produce telephone numbers to be  
16 called, using a random or sequential number generator; and (B) to dial such numbers."  
17 47 U.S.C. § 227(a)(1).  
18

19  
20 17. In an action under the TCPA, a plaintiff must only show that the defendant  
21 "called a number assigned to a cellular telephone service using an automatic dialing  
22 system or prerecorded voice." *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d  
23 1316, 1319 (S.D. Fla. 2012), *aff'd*, 755 F.3d 1265 (11th Cir. 2014).  
24

25 18. The Federal Communications Commission ("FCC") is empowered to  
26 issue rules and regulations implementing the TCPA. According to the FCC's findings,  
27 calls in violation of the TCPA are prohibited because, as Congress found, automated or  
28

prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

19. In 2012, the FCC issued an order tightening the restrictions for automated telemarketing calls, requiring “prior express written consent” for such calls to wireless numbers. See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012)(emphasis supplied).

20. To obtain express written consent for telemarketing calls, a defendant must establish that it secured the plaintiff’s signature in a form that gives the plaintiff a “‘clear and conspicuous disclosure’ of the consequences of providing the requested consent....and having received this information, agrees unambiguously to receive such calls at a telephone number the [plaintiff] designates.” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶ 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

21. The TCPA regulations promulgated by the FCC define “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. § 64.1200(f)(12).

1 In determining whether a communication constitutes telemarketing, a court must  
2 evaluate the ultimate purpose of the communication. See *Golan v. Veritas Entm't, LLC*,  
3 788 F.3d 814, 820 (8th Cir. 2015).

4  
5 22. “Neither the TCPA nor its implementing regulations ‘require an explicit  
6 mention of a good, product, or service’ where the implication of an improper purpose is  
7 ‘clear from the context.’” *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913,  
8 918 (9th Cir. 2012)).

9  
10 23. “‘Telemarketing’ occurs when the context of a call indicates that it was  
11 initiated and transmitted to a person for the purpose of promoting property, goods, or  
12 services.” *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. §  
13 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer*  
14 *Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at \*49).

15  
16 24. The FCC has explained that calls motivated in part by the intent to sell  
17 property, goods, or services are considered telemarketing under the TCPA. See *In re*  
18 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,  
19 18 FCC Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are  
20 encouraged to purchase, rent, or invest in property, goods, or services during the call or  
21 in the future. *Id.*

22  
23 25. In other words, offers “that are part of an overall marketing campaign to  
24 sell property, goods, or services constitute” telemarketing under the TCPA. See *In re*

1 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,  
2  
3 18 FCC Rcd. 14014, ¶ 136 (2003).

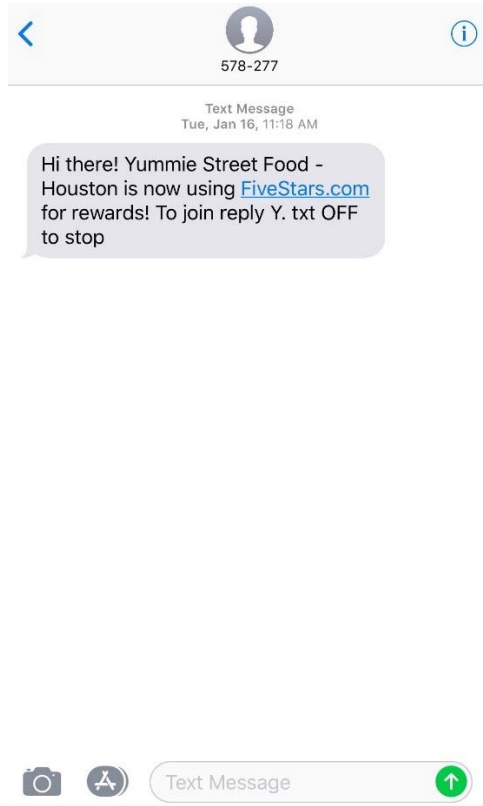
4 26. If a call is not deemed telemarketing, a defendant must nevertheless  
5 demonstrate that it obtained the plaintiff's prior express consent. See *In the Matter of*  
6 *Rules and Regulaions Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd.  
7 7961, 7991-92 (2015) (requiring express consent "for non-telemarketing and non-  
8 advertising calls").  
9  
10

11 27. "Unsolicited telemarketing phone calls or text messages, by their nature,  
12 invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a  
13 violation under the TCPA 'need not allege any additional harm beyond the one Congress  
14 has identified.'" *Van Patten v. Vertical Fitness Grp., LLC*, No. 14-55980, 2017 U.S.  
15 App. LEXIS 1591, at \*12 (9th Cir. Jan. 30, 2017) (quoting *Spokeo, Inc. v. Robins*, 136  
16 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016)) (emphasis in original).  
17  
18  
19

## 20 **FACTS**

21 28. On or about January 16, 2018, Defendant using an automated text-  
22 messaging platform, causing the following text message be transmitted to Plaintiff's  
23 cellular telephone:  
24  
25  
26  
27  
28





29. Defendant's text message constitutes telemarketing because it promotes Defendant's goods and services.

30. The hyperlink contained within the text message links to Defendant's website, where Defendant promotes its good and services.

31. At no point in time did Plaintiff provide Defendant with her express written consent to be contacted by text messages using an ATDS.

32. Plaintiff has never had any type of relationship with Defendant.

33. Plaintiff has never provided her telephone number to Defendant.

34. At no point in time did Plaintiff provide Defendant with her express written consent or express consent to be contacted using an ATDS or a prerecorded message.

1           35. Plaintiff is the subscriber and user of the cellular telephone number that  
2 received the offending text messages.  
3

4           36. The impersonal and generic nature of Defendant's text message establishes  
5 that Defendant utilized an ATDS in transmitting the messages. See *Jenkins v. LL*  
6 *Atlanta, LLC*, No. 1:14-cv-2791-WSD, 2016 U.S. Dist. LEXIS 30051, at \*11 (N.D. Ga.  
7 Mar. 9, 2016) ("These assertions, combined with the generic, impersonal nature of the  
8 text message advertisements and the use of a short code, support an inference that the  
9 text messages were sent using an ATDS.") (citing *Legg v. Voice Media Grp., Inc.*, 20 F.  
10 Supp. 3d 1370, 1354 (S.D. Fla. 2014) (plaintiff alleged facts sufficient to infer text  
11 messages were sent using ATDS; use of a short code and volume of mass messaging  
12 alleged would be impractical without use of an ATDS); *Kramer v. Autobytel, Inc.*, 759  
13 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding it "plausible" that defendants used an  
14 ATDS where messages were advertisements written in an impersonal manner and sent  
15 from short code); *Robbins v. Coca-Cola Co.*, No. 13-CV-132-IEG NLS, 2013 U.S. Dist.  
16 LEXIS 72725, 2013 WL 2252646, at \*3 (S.D. Cal. May 22, 2013) (observing that mass  
17 messaging would be impracticable without use of an ATDS)).  
18  
19  
20  
21  
22  
23

24           37. Specifically, upon information and belief, Defendant utilized a  
25 combination of hardware and software systems to send the text messages at issue in this  
26 case. The systems utilized by Defendant have the current capacity or present ability to  
27 generate or store random or sequential numbers or to dial sequentially or randomly at  
28

1 the time the call is made, and to dial such numbers, en masse, in an automated fashion  
 2 without human intervention.  
 3

4 38. In fact, Defendant admits that it sends automatic marketing offers on its  
 5 own website:  
 6

## 7 Meet AutoPilot

8  
 9 AutoPilot is the tool at the heart of the Fivestars program, sending your customers the targeted offers  
 10 they'll love—totally automatically. We designed AutoPilot explicitly for the needs of local businesses  
 11 (and their time-strapped owners) to deliver the perfectly-timed nudges that get customers coming  
 12 back and spending more.

13 1

14 39. Below is another image, wherein Defendant acknowledges that they  
 15 “automatically send campaigns” through their Autopilot feature including “app  
 16 notification, text message, or email, which is “10x more effective than other marketing  
 17 tools.”  
 18  
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27 <sup>1</sup> Fivestars, Marketing Automation, <https://www.fivestars.com/products/marketing-automation/> (last visited  
 28 March 7, 2018).

We automatically send campaigns that are 10X more effective

Our AutoPilot feature automatically sends your customers an app notification, text message, or email with special offers that bring them back 10x more effectively than other marketing tools

10x

more effective than traditional marketing

Paid Search Ads Direct Mail Email Fivestars

2

40. Defendant's unsolicited text messages caused Plaintiff actual harm, including invasion of her privacy, aggravation, annoyance, intrusion on seclusion, trespass, and conversion. Defendant's text messages also inconvenienced Plaintiff and caused disruption to her daily life.

## **CLASS ALLEGATIONS**

### **PROPOSED CLASS**

41. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on behalf of herself and all others similarly situated.

42. Plaintiff brings this case on behalf of a Class defined as follows:

**All persons within the United States who, within the four years prior to the filing of this Complaint, were sent a text message, from Defendant or anyone on Defendant's behalf, to said person's cellular telephone number, for the purpose of promoting Defendant's property, goods, and/or**

<sup>2</sup> Fivestars, How It Works, <https://www.fivestars.com/businesses/how-it-works/> (last visited March 7, 2018).

1                   **services, without their prior express written**  
2                   **consent.**

3           43. Defendant and its employees or agents are excluded from the Class.  
4  
5 Plaintiff does not know the number of members in the Class, but believes the Class  
6 members number in the several thousands, if not more.

7  
8                   **NUMEROSITY**

9           44. Upon information and belief, Defendant has placed automated calls to  
10 cellular telephone numbers belonging to thousands of consumers throughout the United  
11 States without their prior express consent. The members of the Class, therefore, are  
12 believed to be so numerous that joinder of all members is impracticable.  
13

14  
15           45. The exact number and identities of the Class members are unknown at this  
16 time and can only be ascertained through discovery. Identification of the Class members  
17 is a matter capable of ministerial determination from Defendant's call records.  
18

19                   **COMMON QUESTIONS OF LAW AND FACT**

20           46. There are numerous questions of law and fact common to the Class which  
21 predominate over any questions affecting only individual members of the Class. Among  
22 the questions of law and fact common to the Class are:  
23

- 24                   (1) Whether Defendant made non-emergency calls to Plaintiff's and  
25                   Class members' cellular telephones using an ATDS;  
26  
27                   (2) Whether Defendant can meet its burden of showing that it obtained  
28

1 prior express written consent to make such calls;

2  
3 (3) Whether Defendant's conduct was knowing and willful;

4 (4) Whether Defendant is liable for damages, and the amount of such  
5 damages; and  
6

7 (5) Whether Defendant should be enjoined from such conduct in the  
8 future.  
9

10 47. The common questions in this case are capable of having common  
11 answers. If Plaintiff's claim that Defendant routinely violates the TCPA is correct,  
12 Plaintiff and the Class members will have identical claims capable of being efficiently  
13 adjudicated and administered in this case.  
14

15 **TYPICALITY**  
16

17 48. Plaintiff's claims are typical of the claims of the Class members, as they  
18 are all based on the same factual and legal theories.  
19

20 **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**  
21

22 49. Plaintiff is a representative who will fully and adequately assert and protect  
23 the interests of the Class, and has retained competent counsel. Accordingly, Plaintiff is  
24 an adequate representative and will fairly and adequately protect the interests of the  
25 Class.  
26

27 **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**  
28

50. A class action is superior to all other available methods for the fair and

1 efficient adjudication of this lawsuit, because individual litigation of the claims of all  
2 members of the Class is economically unfeasible and procedurally impracticable. While  
3 the aggregate damages sustained by the Class are in the millions of dollars, the individual  
4 damages incurred by each member of the Class resulting from Defendant's wrongful  
5 conduct are too small to warrant the expense of individual lawsuits. The likelihood of  
6 individual Class members prosecuting their own separate claims is remote, and, even if  
7 every member of the Class could afford individual litigation, the court system would be  
8 unduly burdened by individual litigation of such cases.

9  
10  
11  
12 51. The prosecution of separate actions by members of the Class would create  
13 a risk of establishing inconsistent rulings and/or incompatible standards of conduct for  
14 Defendant. For example, one court might enjoin Defendant from performing the  
15 challenged acts, whereas another may not. Additionally, individual actions may be  
16 dispositive of the interests of the Class, although certain class members are not parties  
17 to such actions.

18  
19  
20  
21 **COUNT I**  
22 **Violations of the TCPA, 47 U.S.C. § 227(b)**  
23 **(On Behalf of Plaintiff and the Class)**

24 52. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set  
25 forth herein.

26 53. It is a violation of the TCPA to make "any call (other than a call made for  
27 emergency purposes or made with the prior express consent of the called party) using  
28

1 any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone  
2 number assigned to a...cellular telephone service....” 47 U.S.C. § 227(b)(1)(A)(iii).

3  
4 54. “Automatic telephone dialing system” refers to any equipment that has the  
5 “capacity to dial numbers without human intervention.” *See, e.g., Hicks v. Client Servs.,*  
6 *Inc.*, No. 07-61822, 2009 WL 2365637, at \*4 (S.D. Fla. June 9, 2009) (citing FCC, In  
7 re: Rules and Regulations Implementing the Telephone Consumer Protection Act of  
8 1991: Request of ACA International for Clarification and Declaratory Ruling, 07–232,  
9 ¶ 12, n.23 (2007)).

10  
11 55. Defendant – or third parties directed by Defendant – used equipment  
12 having the capacity to dial numbers without human intervention to make non-emergency  
13 telephone calls to the cellular telephones of Plaintiff and the other members of the Class.

14  
15 56. These calls were made without regard to whether Defendant had first  
16 obtained express written consent to make such calls. In fact, Defendants did not have  
17 prior express written consent to call the cell phones of Plaintiff and Class Members when  
18 the subject calls were made.

19  
20 57. Defendant violated § 227(b)(1)(A)(iii) of the TCPA by using an automatic  
21 telephone dialing system to make non-emergency telephone calls to the cell phones of  
22 Plaintiff and the other members of the putative Class without their prior express consent.

23  
24 58. As a result of Defendant’s conduct, and pursuant to § 227(b)(3) of the  
25 TCPA, Plaintiff and the other members of the putative Class were harmed and are each



entitled to a minimum of \$500.00 in damages for each violation. Plaintiff and the class are also entitled to an injunction against future calls.

**WHEREFORE**, Plaintiff, Allison Fejeran, on behalf of herself and the other members of the Class, pray for the following relief:

- a. A declaration that Defendant's practices described herein violate the Telephone Consumer Protection Act, 47 U.S.C. § 227;
- b. A declaration that Defendant's violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, were willful and knowing;
- c. An injunction prohibiting Defendant from using an automatic telephone dialing system to call and text message telephone numbers assigned to cellular telephones without the prior written express permission of the called party;
- c. An award of actual and statutory damages; and
- d. Such further and other relief the Court deems reasonable and just.

**JURY DEMAND**

Plaintiff and Class Members hereby demand a trial by jury.

**DOCUMENT PRESERVATION DEMAND**

Plaintiff demands that Defendant take affirmative steps to preserve all records, lists, electronic databases or other itemization of telephone or fax numbers

1 associated with the Defendant and the communication or transmittal of  
2 advertisements as alleged herein.  
3

4  
5 Respectfully Submitted this 8th Day of March, 2018.

6 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

7 By: /s/ Todd M. Friedman

8 Todd M. Friedman

9 Law Offices of Todd M. Friedman

10 Attorney for Plaintiff  
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